90-684

NO.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CLAWZELLE WIGGINS,
Petitioner,

versus

CHRYSLER CORPORATION,
Respondent,

ACUSTAR, INC.,
Respondent,

UNITED AUTOMOBILE, AEROSPACE, AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), CHRYSLER INTERNATIONAL,
Respondent,

UNITED AUTOMOBILE, AEROSPACE, AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), CHRYSLER LOCAL 1435,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a Section 301 Action where the Union Member sues the Employer for wrongful discharge and the Union for Unfair Representation, does theDistrict Court err in dismissing the Action for the Union Member's failure to appeal to the Union, after the Union informs him that the Union will which had been fought for eighteen months, not take his grievance any further, and in response to the member's claim the Union had not properly presented his grievance, and request for relief, represents to him that nothing further can be done, thus the Union concealing from the uninformed member that the Union could by granting his appeal, reactivate his grievance, but financially depressed, member thus brings this action.

2. In a Section 301 Action, where the Union and Employer assert the defense that the Union Member failed to use his right to Appeal to the Union to reactivate the member's grievance, does the District Court err, in denying the Union Member's Motion for a stay, and/or for Dismissal Without Prejudice, when the Union Member was in fact uninformed of his right to Appeal, but claimed his Union had not properly and full represented him?

3. In a Title VII Action for Wrongful Discharge by his employer does the District Court err in granting summary Judgment, when the Plaintiff, a Black person, offers evidence that he was the only person ever discharged under the Employer's "Chronic Absentee Procedure Program," and that the Employer discriminated in favoring whites in the Program, and did not discharge two whites with comparable records.

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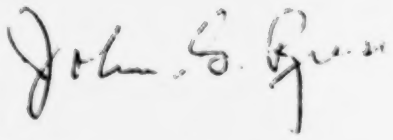
III. IN A TITLE VII ACTION, A PRIMA FACIE CASE IS MADE WHEN THE EMPLOYER FILES A REPORT SHOWING 27 PERSONS HAD ABSENTEEISM RECORDS WORSE THAN PETITIONER PLAINTIFF, A BLACK MALE, WHO WAS THE FIRST PERSON DISCHARGED BY THE EMPLOYER UNDER ITS ABSENTEEISM CONTROL PROGRAM; AND EVIDENCE IS OFFERED THAT TWO WHITES WITH WORSE OR COMPARABLE RECORDS WERE TREATED MORE LENIENTLY AND WERE NOT DISCHARGED.

CERTIFICATE OF SERVICE

3 Copies of this Petition For Writ of Certiorari are served by U.S. Mail, First Class, this September 24, 1990 on Chrysler Attorney Thomas A. Dixon,and Union Attorney Joan Torzewski.



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Counsel For Petitioner

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REFERENCE TO REPORT OF DISTRICT COURT OPINION

The Opinion and Order of the District Court, by Judge Richard B. McQuade, filed on June 22, 1989, which granted Summary Judgment for each Defendant, is reported in 728 F. Supp. 463, N. D. Ohio, W. D.

STATEMENT OF GROUNDS VISITING JURISDICTION IN THE SUPREME COURT OF THE UNITED STATES

This Petition for a WRit of Certiorari is from the Order, filed June 25, 1990, of the United States Court of Appeals for the Sixth Circuit, which affirmed the judgment and Opinion of the DistrictCourt, which granted Summary Judgment to each Defendant.

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by a Writ of Certiorari is 28 USCS Section 1254 (1), which reads in 28 USCS:

"§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give b inding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch. 646, § 1, 62 Stat. 928; June 27, 1988, P. L. 100-352, §2 (a), (b), 102 Stat. 662.)

STATUTES RELIED UPON

Plaintiff has brought his Action on Section 301 of the Labor Relations Management Act, (1947), 29 USC. Section 185;

and under Section 703 of Title VII of the Civil Rights Act of 1964, 42 USC Section 2000 (e) et. sequ.; and 28 USC Sections 2201 and 2202.

STATEMENT OF THE CASE

Plaintiff-Appellant Clawzelle Wiggins brings this Action against Defendant Chrysler Corporation which through a subsidiary, "Acustar," operated a factory in Perrysburg Township, Wood County, Ohio, for the manufacture of parts for Chrysler cars. Plaintiff-Appellant Wiggins was Employed continuously from his hire on October 9, 1967, and sues Chrysler for wrongful discharge in breach of the Collective Bargaining Agreement with the UAW, and claims Local 1435, and the International, were guilty of Unfair Representation in the Grievance Procedure. In his Title VII Action, Mr. Wiggins claims that Chrysler discriminated against him because heis black in disciplining anddischarging him for matters for which Chrysler did not discipline nor discharge whites.

Petitioner Wiggins claimed that

his absences were largely due to physical disabilities, as shown by Doctors' reports and Hospital records. Chrysler's "Chronic Absentee Procedure" did call for the employees with the worst rates of over 20% to be identified, counselled, and progressively disciplined if improvement was not made. The "Procedures" and discipline called for by the Collective Bargaining Agreement are summarized in a card, given Union members as follows:

"Step 1 - Notice of Absence
- Issued by Supervisor
- Prior verification of accuracy of attendance data by Attendance Counselor and Labor Relations office

"Step 2 - Written Warning
- Issued by Supervisor
- Counseling by Attendance Counselor alone when employee enters Step 2 for the first time.

Step 3 - Foreman Report and 5 Day DLO
- Issued by Supervisor
- Counseling by Attendance Counselor and Superintendent/Area Manager (Warehouse Manager) or designated representative, following assessed DLO or return from DLO.

Step 4 - Foreman Report and 15 Day DLO
- Issued by Supervisor
- Counselling by Attendance Counselor and L. R. Supervisor or designated represent ative, following return from DLO.

Step 5 - Foreman Report and 30 Day DLO
- Issued by Supervisor
- With prior agreement with Labor RElations Supervisor or designated representative, Union Attendance Counselor may counsel alone following return from DLO.

Step 6 - Discharge

Petitioner was placed in the Chronic Absentee Procedure Program on August 20, 1985, and Chrysler then discharged him on August 29, 1986, and a grievance was filed on September 2,

1986. Petitioner Wiggins alleged in his Amended Complaint, filed June 8, 1989, that the Union in the program, and in the Grievance later, failed to point out to Chrysler and to require them to comply with the Chronic Absentee Procedure Program by:

1) after an alleged counselling meeting, Chrysler from August 20, 1985, was never counselled by Chrysler;

2) in the six months ending December 30, 1985, Petition was neither notified orally or in writing, or counselled, that his attendance was not improving nor that his absences exceeded the 20% level; and likewise in the six months ending June 30, 1986; nor until his discharge on August 29, 1986;

3) nor was Petitioner attendance record reviewed by the National Attendance Council.

Petitioner also claimed that his

evidence showed that he had not, by the Contract, had sufficient unexcused absences, as even to have been put into Program.

Petitioner alleged in his Amended Complaint in Paragraph 9:

> "9. During the period beginning December 1, 1985, and ending May 31, 1986, Plaintiff's absenteeism increased due to a series of illness' which required him to miss work on the following dates:
>
> December 3-12, 1985 (dehydration and gastro-enteritis);
>
> January 6-8, 1986 (personal illness);
>
> January 29 through February 24, 1986 (knee injury);
>
> March 4-5, 1986 (personal illness);
>
> April 14-May 9, 1986 (joint effusion left knee);
>
> May 17-28, 1986 (bursitis in shoulder, back);
>
> Inall cases mentioned above, PLaintiff promptly reported his inability to report to work and submitted proper

written medical
documentation to his employer
in accordance with the terms
of the Procedure."

Petition alleged and claimed that the Union failed to represent him fairly in not presenting all the evidences to show his absences were not wilful, but due to his physical condition, as shown by the Doctor and Hospital records and reports, and further that the Union did not give due emphasis to the harm worked Petitioner by not requiring Chrysler to live up to their Contractual duties to warn him, so that he could take any needed corrective action in the Chronic Absentee Procedure Program. Further, Petitioner charged that Union in the Grievance Procedures, is not doing the same things, is not informing Petitioner of the "Pros and Cons", in the evidences and claims, raised by each side so that Petitioner could defend himself, and so that Petitioner

and his ATtorney then could likewise adequately respond, but instead, the Union left him "in the dark"; and in fact and in truth, defenseless, whereas if the Pros and Cons had been told him, Petitioner would have won his Grievance.

Petitioner also alleged and offered evidence that top UAW representation, in the National Headquarters in Detroit, as Solidarity House, admitted that the Union had not represented him properly and had "messed up."

At the conclusion of the Grievance Procedure Chrysler , through the National Attendance Council, which took over the Grievance Procedure, offered Petitioner his job back, without back pay, and with the proviso that the period from August 9, 1986, to April 1, 1988, would not be counted in Petitioner's Seniority, but would be held to be a "disciplinary layoff." Petitioner refused.

Petitioner was informed by a group of Union Officials from his Local 1435. In his Affidavit filed in Opposition to Respondents' Summary Judgment Motions, Petitioner stated in part:

> "14. On April 12, 1988, I was called down to the union office at the Chrysler plant, where I met with several union officials without an attorney. It was the first time any Union official had contacted me since the meeting between Step 2 and 3 of the grievance. They read out loud a prepared statement concerning the decision of the National Attendance Council. I had informed them again, that the decision was based on incorrect information and that the major arguments of my grievance were not presented to the NationalAttendance Council. While I did reject the reinstatement at that time, it was based on the fact that I felt I deserved the back-pay as well as the reinstatement due to the glaring errors that had been committed by the Company in implementing the Chronic Absentee Procedure as it related to me. I made these points clear to my union officials, but the major arguments that I have stated herein were not addressed

before the National Attendance Council.

15. UPon reading me the decision, and my rejection thereof at the August 12, 1988 meeting, BErnie SAilor and Robert Hammonds, President of Local 1435, indicated to me that there was nothing more that the Union could do for me, nor that I could do for myself concerning this matter,and that I had no other recourse concerning this grievance. ADditionally, no one at the Union would even tell me I should apply for unemployment compensation, even when I asked if there was any way I could obtain financial assistance during the pendency of my grievance."

Petitioner then through his attorney filed this Action on May 23, 1988. Respondents have not in this Briefs claimed that either Petitioner nor his then Attorney, knew of Petitioner's right to Appeal to the UAW to reactivate his Grievance, and Petitioner stated that no one ever told him about such a right. Petitioner in his Affidavit pointed out that he had but a ninth

grade education, and did not understand from the Solidarity issues - the Union paper which the UAW distributes to its members - that he had such a right to try to reactivate his Grievance. Since Petitioner has fought every step of the way, the best he could, despite the lad of real, good faith, representation by the Union, the record certainly calls for the inference that Petitioner was in fact and in truth ignorant of his right to appeal to the UAW to reactivate his Grievance, and reasonably so. Here, the failure at the meeting with the Union representative, the President, Mr. Hammonds, and the Grievance Handler, Mr. SAilor, to tell Petitioner of that right, whether Mr. Hammonds or Mr. SAilor, either themselves did not know of the right to appeal, or that they wilfully concealed it from

Mr. Wiggins calls for Judicial redress.

While the Grievance was going on, Petitioner sought Unemployment Compensation, was at first disallowed his claim, and then after a Hearing before the Board of Review, Unemployment Compensation, State of Ohio, was awarded relief. AT the Hearing, Chrysler was represented by their Attorney Mary Ann Whipple, and by Mr. Jerry James, Labor RelationsSupervisor, a Witness. At this Hearing, the Hearing Officer dealt with the issues of the "Chronic Absentee Procedure." The Official OPinion shows that evidence was offered on his days absent, and the reasons therefor. This Counsel, not of Counsel in any of the other stages of this case, knowsthat Mrs. Wiggins continuously in his Deposition pointed to the proof adduced at the Unemployment Hearing, as evidence of what was available to

to show Chrysler had no "just cause" to discharge him, and why Mr. Wiggins was in the right, while the issues are not altogether the same, we submit that it is relevant at this point for this Court to consider the findings in evaluating whether to take this case, and then to remand for further proceedings. At Page 5 of the Unemployment Decision, the Hearing Officer held in part:

> "The facts set forthshow that the claimant was a member of the UAW which has an agreement with Chrysler Corporation providing a Chronic Absentee Procedure. The claimant was placed on said program in 1985. The insurance department makes the decision of which illnesses are excludable and not counted against the employee's record, and which illnesses are includable and counted against the employee's record. The claimant's discharge was based on his absentee record for the period beginning December 1, 1985, and ending May 31, 1986. During this period of time, the claimant had

four leaves of absence for illness, including one hospitalization. In addition, the claimant had two other occasions when he missed two and three consecutive days of work due to illness. These periods were coded as excludable by the employer; however, the insurance department decided that these must be counted against the claimant's record. For his medical leaves of absence, the claimant supplied medical documentation. The employer has submitted the Medical Guidelines which list various illnesses and the decision of whether or not the illness is includable or excludable. For instance, absence due to disorders of the adrenal glands is excludable. However, anal fissure and fistual surgery is includable. Absences due to coronary artery disease are includable. The probative evidence before the Refe ree does not reveal the rationale behind the determination of exd udable and includable. For a medical leave of absence not to count against an employee, the employee has to be sure that he contracts an illness determined by the insurance

> group to be excIudable. Although the average person hopes to never cntraCT an illness, one does not have control over wich illness one contracts. Based on the probative evidence before the Referee, it must be determined that the claimant was discharged by Chrysler Corporation without just cause in connection with the work. No disqualification of benefits should be imposed as a result of this separation from employment."

In the district Court, the Court dismissed the 301 Action, for failure of Petitioner to exhaust his Appeal to the Union, which could have re-activated the Grievance. Petitioner had opposed that defense, by arguing Petitioner never knew of such a right until after this Action was filed and cla imed no Union person ever told him of it, not even when in 1988 the Local President and the Grievance Handler told him that his Grievance was lost, and that was all that could be done, and that there was

no way in which his Union could be of help. Petitioner did not a copy at any time of the UAW Constitution, Article 33, of that Constitution, which provides for the Appeal, is printed in the Appendix herein, as Pages Appendix 24. Petitioner also claimed that the 18 months waiting in the Grievance Procedures was sufficient delay, for one in his financially depressed condition.

The District Court also on the 301 Action denied Petitioner Motion for a Stay, during which Petitioner might undergo an Union Appeal, and further denied Petitioner's Motion to Dismiss without Prejudice with the Right to Refile, during which period Petitioner would have taken his Union Appeal.

Lastly, the District Court granted summary Judgment on the

Title IV Civil Rights Action, holding that Petitioner had not offered sufficient evidence that whites had received more favorable treatment and discipline than had Petitioner. Petitioner claimed that several whites, with records either worse than, or comparable to Petitioner's, had been given more counseling than the one meeting with Petitioner, and that several whites had more "included" or unexcused absences than Petitioner, but were not discharged.

ARGUMENT

I. UNDER THE THREE PRONG TEST DECLARED IN CLAYTON V. INTERNATIONAL, UAW, ANY STATEMENT BY A UNION OFFICIAL OR REPRESENTATIVE WHICH REASONABLY WOULD HAVE A UNION GRIEVANCE, AT THE STATE OF THE UNION'S FINAL REJECTION OF THE GRIEVANCE, NOT TO KNOW OF THE GRIEVANCE'S RIGHT TO APPEAL WITHIN HIS UNION TO REACTIVATE THE GRIEVANCE, PROVIDES LEGAL EXCUSE AND JUSTIFICATION FOR NOT TAKING THE UNION APPEAL

Here, we claim that under Rule 10 of the Rules of the Supreme Court, that there is a conflict in the decisions of the U. S. Courts of Appeal, and additionally, that there now is an important question of federal law which should be settled by this Court.

Firstly, in Clayton v. International Union, UAW, et al., 451 U. S. 679 (May 26, 1981) this court stated at Page 689:

"(6) As we stated in NLRB v. Marine Workers, supra, at 426, and in n 8, 20 L ed 2d 706, 88 S. Ct 1717, courts have discretion to decide whether to require exhaustion of internal union procedures. In exercising this discretion, at least three factors should be relevant; first, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under §301; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. If any of these factors are found to exist, the court may properly excuse the employee's failure to exhaust."

Here, if Petitioner had taken an Appeal to the UAW Public Review Board, and had proven that the Grievance

handlers had mishandled the Grievance because of "fraud, discrimination or collusion with management." then the Petitioner Grievance could have been re-activated. Thus in the UAW Constitution, Article 33, Section 4 (i) reads:

> "(i) GRIEVANCE AND RELATED APPEALS. In any appeal to the Public Review Board, under Section 3 (f) of this Article, concerning the handling of a grievance or other issue involving a collective bargaining agreement, the Public ReviewBoard shall not have jurisdiction unless the appellant has] alleged before the International Executive Board that the matter was improperly handled because of fraud, discrimination or collusion with management, or that the disposition or handling of the matter was devoid of any rational basis."

Here, in Justice, we submit that this Court should take Jurisdiction here, and declare just what a Union

must do at the stage of the Union's final rejection of the Grievance, as was the case here. When the Union member is called to meet withseveral, not just one, Union Officials and important Union people, then the legal minimum that should be required is thatthe member be given a "Boiler Plate Form" telling the member that the Union leaders have decided not to take the Grievance any further, but that if the Union Grievance is not satisfied, that before the Union Member should take any legal action, that then the Union Member should Appeal to the InternationalExecutive Board, or the Public Review Board, or wherever the Union gives the right to appeal.

To discharge for cause a Union member from an established employer through the Union Grievance procedure, is like "Capital Punish-

ment," for that Union member.

The Unions can work out matters to provide for written documentation. AT this final stage, before the Appeal to the Union, in the real world, the Union for sure has the knowledge of the Appeal right, or doesn't, and if the local President and Grievance Handler don't know, how in all Justice can the Courts expect the Union Members to know. It's either fraudulent concealment, and if it is that, then most assuredly this most renowned Court in the world, should not give such concealment its Judicial Stamp of Approval. If it's a case where in fact the Union President, and Union Grievance Handler didn't know, then the Courts should not require the Union Members to know. In either event, the best considered Federal policies of good

Industrial Relations call then for the worker to have the Right "to go to Court."

In the present case at Bar, the Sixth Circuit Court of Appeals has upheld what the District Court thought was in line with prior Sixth Circuit decisions. The Conflict in opinions between the Circuit is recognized by the able District Judge Richard B. McQuade, in this case in Wiggins v Chrysler Corporation, 728 F. Supp. 463 (USD Ct., N. D. Ohio, W. D. 1989) where the Court stated, in referring to the three prong test in Clayton v. International, UAW, Supra, in 728 F. Supra at Page 466:

> "The burden is on the employee to show that his failure to exhaust intraunion remedies should be excused because of one of the factors enumerated above. Monroe v. International Union

723, F.2d 22, 25 (6th. Cir. 1983) (per curiam). Contra Johnson v. General Motors Corp., 641 F. 2d 1075, 1079 (2d Cir. 1981). Whether to excuse the exhaustion requirement is a matter of this court's discretion. Clayton 451 U. S. at 689, 101 S. Ct. at 2095.)

The issue of the holding is Johnson, supra, is that the Union Member could rely on what the Union representative said that nothing further could be done. So, with Petitioner Wiggins.

Here, the UAW Counsel will claim that the UAW sends each member issues of Solidarity, which so informs the member of the member's rights to appeal to the UAW to reactivate the Grievance. Mr. Wiggins with a ninth grade education said he didn't comprehend such alleged notices. If the Courts hold Mr. Wiggins should have known, should the Local President Mr. Hammonds and the Grievance Handler, Mr. Sailor, have known, as well as

the others? Does Fraud by the Union excuse the Duty to take the Union Appeal?

Everyone when faced with bad news tends to become tense, and not as able to think clearly. So here. Mr. Wiggins was without a job for over 18 months, financially and, we submit, emotionally depressed. But there was no written Notice given at such a crucial time. To require a written Notice is not burdensome, and probably, would save everyone's time in the long run.

The American people expect, and rightfully so, that this Court will make decisions which in the real world are just, intelligent, practical, common sense, but not based upon myth or a legal fiction.

One of the grounds for requiring the Union Members to appeal to his or her Union is to save

law suits, and also to narrow the issues.

The Appeal and ultimate goal sought by Petitioner Wiggins is in keeping with the best and brightest traditions of the United States.

We submit that the better reasoned decision on the issue as to what circumstances, and the burdens of proof on Summary Judgment Motions, justify the Union Members is not taking the Appeal to his Union to re-activate the Grievance, is Johnson v. General Motors, 641 F. 2d 1075, (CA 2, 1981), where the District Court's granting of Summary Judgment, under facts substantially similar to those in the case at Bar, was reversed. The Second Circuit Opinion in Johnson, Supra, in 641 F. 2d at Page 1075 comprehensively and ably discusses this problem as follows:

These provisions offer no guidance concerning the filing of joint complaints against the Local and the International, as in this case. Moreover, it is not clear that article 32 would apply to all aspects of a violation of the duty of fair representation, because article32 refers only to high moral and ethical standards.5

Further, the PRB can exercise jurisdiction over unfair representation claims only if the member alleges bad faith, whereas a court's jurisdiction in such claims isnot so limited.6

Article 33 sets forth an even more complex maze of appeals procedures for challenges to local union action.7

ACcording to certain affidavits submitted by the International, the member must first seek approval for appeal from the membership of his local union (unless this step is waived). He may then appeal to the International Executive Board and, in turn, to the Constitutional Convention Appeals Committee of the International Union or to the Public Review Board. (Sections 1-8)[8] No provision appears in Article 33 relating to a challenge to alleged wrong-

ful conduct of the International, either alone or in conjunction with the Local.

Given the complexity of the UaW procedures, we cannot accept the conclusion that the procedures are reasonable as a matter of law. The Unions have presented no documentation in the record or in the cases cited, upon which the reasonableness of the procedures can be assumed. ACcording to commentary on the subject, only one appeal to the Public Review Board in its twenty-eight history has resulted in a finding that the union breached its duty of fair representation. See Fox & Sonenthal. Section 301 and Exhaustion of Intra-union Appeals: A Misbegotten Marriage, 128 U. Pa. L. Rev. 989, 1008 n. 75 (1980).

Moreover, on the record before us, we see no basis for believing that a typical rank and file union member could understand and follow the procedures necessary to pursue the intra union appellate remedies, especially considering the procedural intricacies contained in articles 32 and 33

of the UAW Constitution.[9] Here, in particular, because Johnson alleges that he received no information on the available remedies and that the Union president, in effect, rejected Johnson's request for assistance and led him to believe that internal appeals were exhausted, a trial court cannot merely assume that the unions have offered him and his fellow union members a reasonable intraunion remedy to contest allegedly improper action by leadership of the Local or the International. Indeed, our review of these complex constitutional procedures convinces us thata union member would need considerable expert assistance either from his union or from some other source to work his way through this maze of union procedures.

The district court, in applying the exhaustion defense to Johnson as the basis for dismissing the lawsuit, relied on Newgent v. MOdine Manufacturing Company, 495 F .2d 919 (7th. Cir. 1974)

There, under similar circumstances, the court dismissed the union member's claim for failure to exhaust intraunion remedies. The district court cited the following argument from the Newgent case:

""By becoming a member of the Union Newgent was contractually obligated to exhaust union remedies before resorting to a court action. ***Necessarily implied in this obligation is the duty to become aware of the nature and availability of union remedies. Newgent was not justified in remaining in ignorance of the provisions governing his own union or, in fact, relying on a statement by an officer that there was nothing he could do."" Id., at 927-28 (Dist. Ct. op. at 4.)

We do not agree. The union changes roles in a case of this kind. From the representative of the plaintiff under the collective bargaining agreement, the union becomes the plaintiff's opponent in defending its right to terminate a grievance.

Thus, when the union member seeks relief through intra-union procedures, the Local and the UAW will likely be in a posture adverse to their member. Under such circumstances, a duty ought to rest upon the union to inform its members of available internal remedies. See Geddes v. Chrysler Corp. , supra, 608 F. 2d at 264; Detroy V. American Guild of Variety ARtists, supra. 286 F. 2d at 81; Cammarata v. Ice Cream Drivers & Employees Union, Local 757, supra, 441 F. Supp. at 701. The nature and extent of information disseminated by the International and Local unions to its members, as compared to the complexity of the remedies, bears on the court's determination of the reasonableness of the intraunion remedy.

Although other courts have found the UAW proeedures adequate, they did not address the question of reasonableness. See, e. g. Clayton v. ITT Gilfillan, supra. 623 F .2d at 566; BAldini v, Local No. 1095, UAW, supra, 581 F .2d at 149; Reid v. UAW, Local 1093, 80 L. R. R. M. 2886, 2892 (N. D. Okla 1972). These

decisions, moreover, relied either on conclusory affidavits or on opinions that accepted without analysis a finding of adequacy. The Union's burden of showing reasonableness cannot rest on such assumptions.10

(9-11) The exhaustion defense to a union member's suit for failure of the Union to provide fair representation may not be successfully asserted unless the unions establish that the intra-union remedies are in fact (1) adequate, (2) not futile, and (3) reasonable under the circumstances.

Here, the Union failed to establish the reasonableness of the exhaustion defense and Johnson at least raises an issue of fact on the reasonableness of applying the exhaustion defense against the Local and UAW. ACcordingly, the entry of a summary judgment of dismissal against the Union must be reversed and the case remanded to the district court for a determination of the reasonableness of the Union's appellate procedures in this situation.11

II. IN A SECTION 301 ACTION, THE DISTRICT COURT SHOULD ALLOW A PLAINTIFF UNION MEMBER A REQUESTED STAY SO THAT THE UNION MEMBER MAY PURSUE HIS OR HER APPEAL TO THE UNION FOR RELIEF OR TO REACTIVATE THE GRIEVANCE: OR SHOULD ALLOW THE UNION MEMBER TO DISMISS HIS OR HER ACTION, WITH THE RIGHT TO REFILE IN A STIPULATED TIME. IF THE DISTRICT COURT FEELS THAT THE UNION MEMBER IS AT FAULT IN NOT HAVING PURSUED THE UNION APPEAL BEFORE, SANCTIONS, OTHER THAN SUMMARY JUDGMENT, SHOULD BE INVOLVED.

Much of what has been stated before implicatly applies here.

This Counsel has not found any so-called "cow case" holdings -- cases that stand on "All Fours" -- with these issues.

In NLRB v. Industrial Union of Marine and Shipbuilding Workers of America, etc., 391 US 418, (1968) in referring to the 4 months limit put on Unions by the Labor-Management Reporting and Disclosure Act of 1959, 29 USC § 411(a)(4), for requiring Infra-Union appeals before instituting lawsuits against the Union,

this Court stated at page 426: We conclude that "may be required" is not a grant of authority to unions more firmly to police their members but a statement of policy that the public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved person seeks relief within the union. We read it, in other words, as installing in this labor field a regime comparable to that which prevails in other areas of law before the federal courts, which often stay their hands while a litigant seeks administrative relief before the appropriate agency.

In Ritza v. International Longshoremen's and Warehousemen's Union, et al, 837 F2d 365, (CA 9, 1988) the Court held that the Union's motion to Dismiss or for Summary Judgment, was a Dismissal without prejudice, as to the Section 301 Actions. In 837 F.2d at

Page 368, the opinion read:

> "However, we find nothing in the district court's order or findings of fact and conclusions of law indicating that summary judgment was granted. RAther, it appears that the district court dismissed the section 301 claims without prejudice.3

The issue was not decided in Hester V. International Union of Operating Engineers, 818 F.2d 1537 (CA 11, 1987), in Footnote 24 at Page 1546 stated in part:

> "NLRB v. Industrial Union of Marine and Shipbuilding Workers, 391 U. S. 418, 88 S. Ct. 1717, 20 L. Ed. 2d 706 (1968). The Industrial Union Court construed the provision as permitting a district court, in its discretion to stay a union member's action until union remedies have been exhausted or unsuccessfully sought, but only for a period of up to four months. 391 U. S. at 428, 88 S. Ct. at 1724. See also Chapa v. Local 18 737 F.2d 929, 931

(11th. Cir 1984)
Keene v. International Union of Operating Engineers, 569 F.2d 1375, 1379 (5th Cir. 1978).

III. IN A TITLE VII ACTION, A PRIMA FACIE CASE IS MADE WHEN THE EMPLOYER FILES A REPORT SHOWING 27 PERSONS HAD ABSENTEEISM RECORDS WORSE THAN PETITIONER PLAINTIFF, A BLACK MALE, WHO WAS THE FIRST PERSON DISCHARGED BY THE EMPLOYER UNDER ITS ABSENTEEISM CONTROL PROGRAM; AND EVIDENCE IS OFFERED THAT TWO WHITES WITH WORSE OR COMPARABLE RECORDS WERE TREATED MORE LENIENTLY AND WERE NOT DISCHARGED.

Plaintiff at the District Court offered evidence that Ms. Blasingim's record for comparable period, was 46%, worse than Petitioner's, but she was counselled twice, and Petitioner had but one at the outset, and she was not discharged.

Likewise, as to Chrysler employee, Mr. DiLucia, white, with absence rate of 80.3%, was counseled a second time, and not discharged.

Here, since the employer has all the records, is most interested in administering its Control Program, the Burdenof Proof on Summary Judgment

after some evidence is brought forward, should be on the employer. Such is practical, efficient, and Just. If a Plaintiff needlessly takes the Court's time, then proper sanctions may be invoked. We cite:

McDonald Douglas Corporation v. Green, 411 US 792 (1973); and Texas Department of Community AFfairs v. Burdine, 450 US 248,252-253 (1981).

CONCLUSION

For this Court to grant Certiorari is to take a step forward in an area where the discharged worker has little if any power in the struggle that he or she faces.

Judicial economy deserves high and effective support. The defense of failure to exhaust one's intra-union appeals, is, we submit, a defense, much like the now dimly

viewed defense of contributory negligence. In the real world, the Union Members, even in the well run and ordinarily to be commended UAW, simply at a time of crisis is not aware, nor isthe ATtorney to whom the discharged Union Member turns, aware of such right of Appeal.

Here, and in every lawsuit, once that the Union or Employer raises this defense, the Trial Court can order a Stay or allow a Dismissal with the Right to Refile within a Stipulated Time,, and thus accomplish the proper goals of Judicial Economy.

The relief we seek, will work to keep high the esteem and respect with which all Americans and the world should give this Honorable Court.

We respectfully request this

Court to grant Certiorari.

We close with the memorable words of Judge Cudahy in Dober v. Roadway Express, Inc., 707 F.2d 292, (CA 7, 1983) in his concurring in result Opinion at Page 298:

> "Many discharged employees are undeserving, but some are not. And no one is more powerless than the employee who has incurred the open hostility of his employer and the unspoken disfavor or indifferent of those in control of his union. The majority speaks of recourse through the democratic process, but this is of scant value to the worker who has beenfired. In the present effort to close and lock the courthouse doors, it is no accident that the powerless are the first to suffer. I cannot therefore agree with the views announced today by the majority.

Respectfully submitted,

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